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NO. 241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

CONWAY C. CRAIG, BOB MCCRACKEN AND TOM MULVANEY,

Petitioners

v.

JOHN B. HARNEY, SHERIFF OF NUECES COUNTY, TEXAS

Respondent

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Petitioners have not filed any brief in this case except their brief in support of the petition for a writ of certiorari. This brief for respondent is directed to that brief.

OPINION OF THE COURT BELOW

The opinion of the Court of Criminal Appeals is reported under the style of Ex parte Craig, Ex parte McCracken, Ex parte Tom Mulvaney. Vol. 193 S.

W. (2) 178, and is copied in the record from pages 418 to 449.

NATURE OF THE CASE

The petitioners, who are the publisher, managing editor, and news reporter of newspapers of general circulation in the City of Corpus Christi, and in Nueces County, Texas, were accused by complaint, (R. pp. 12 to 19) duly filed in the County Court of Nueces County, Texas, of being in contempt of that Court for publishing in May and June of 1945 news accounts of, and an editorial commenting upon, the trial of a civil case known as *B. M. Jackson, et al.* v. *Joe L. Mayes, et al.* The news accounts and editorials complained of were published during the trial of the case on its merits before a jury, and while the Court was considering a motion for a new trial (R. p. 18) after he had instructed the jury to return a verdict for the plaintiff (R. p. 207). On June 4, 1945, while the Court had under consideration the motion for a new trial, the Judge of said Court, acting upon a complaint filed on that day, entered a judgment nisi adjudging the petitioners guilty of contempt and directing that they be summoned to appear on June 8, 1945, and show cause why the judgment nisi should not be made final (R. p. 26). Under the judgment of contempt the petitioners were sentenced to a term of three days in jail. On August 3, 1945, the Court entered final judgment ordering that the petitioners be so punished for their contemptuous news accounts and editorial.

The motion for new trial in the civil case, which was a suit for forcible detainer, was denied and the judgment of said suit became final on June 6, 1945 (R. p. 209). When the final judgment was entered in the contempt proceedings against petitioners, the Court found that "the said reports and editorial, *considered in their entirety*, by reason of inaccuracies contained therein, material matters omitted therefrom, emphasis on matters of evidence adduced at the trial of Cause No. 3624, and the inclusion in said articles and editorial of matters foreign to the record in said cause, were of a nature calculated to reflect upon the integrity of this Court, to embarrass this Court, *to affect the course of justice and the rights of litigants in Cause No.* 5095, *to coerce and compel a judgment contrary to the law and the evidence in said Cause No.* 5095 *and to block the administration of justice, and that the said news reports and editorial were intended so to do.*" (R. p. 84) (No. 5095 is the number of the case in the Justice Court and No. 3624 is the number of the case in the County Court).

Petitioners applied to the Court of Criminal Appeals for a writ of habeas corpus and that Court after a hearing adjudged the petitioners guilty of contempt (R. 449). The majority of the Court held that the petitioners were not protected by the guaranties of freedom of the press (R. 413-448). There was a dissenting opinion which held that the publications were not contemptuous (440-449).

The presiding Judge of the Court of Criminal Ap-

peals granted a stay of execution pending disposition by this court of this proceeding (R. 458).

SUMMARY OF THE ARGUMENT

COUNTER-POINT 1

The Court of Criminal Appeals of Texas, in the instant case, has applied the rule of "clear and present danger" in accordance with the principle announced in Bridges v. State of California, 314 U. S. 252, 62 S. C. 190.

AUTHORITIES

Bridges v. State of California, 314 U. S. 252.
Craig v. Hecht, 263 U. S. 255-278.
Patterson v. Colorado, 205 U. S. 454.
Pennekamp v. State of Florida, 66 S. Ct. 1029.
6 R. C. L., p. 508, Sec. 20.
Schenck v. U. S., 249 U. S. 47.
Toledo Newspaper Company v. U. S., 247 U. S. 402.

COUNTER-POINT II

The finding of the Court of Criminal Appeals of Texas that the publications complained of constituted a clear and present danger to the impartial administration of justice is supported by the record in this case, is warranted under

the circumstances, and is within the field of that court's judgment.

AUTHORITIES

Bridges v. State of California, 314 U. S. 252.
Pennekamp v. State of Florida, 66 S. Ct. 1029.
Texas Constitution, Art. 5, Sec. 15.

COUNTER-POINT III

The truthfulness of publications commenting on a pending trial constitute no defense, when the publications present a clear and present danger to the impartial administration of justice.

AUTHORITIES

Beacon Lumber Company v. Brown, 14 S. W. (2) 1022.

Burt v. Smith, 203 U. S. 129.

French v. Taylor, 199 U. S. 274.

Luckenbach v. U. S., 272 U. S. 533.

Patterson v. Colorado, 205 U. S. 454.

Rawlins v. Georgia, 201 U. S. 638.

Vernon's Texas Civil Statutes, 1925, Art. 3992.

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COUNTER-POINT IV

The judgment of the Court of Criminal Appeals of Texas, rendered herein, contains no elements affecting its validity, force or effect.

AUTHORITIES

Patterson v. Colorado, 205 U. S. 454.
9 Tex. Jur., p. 623, Sec. 37.
Thomas v. Collins, 328 U. S. 516.
Vernon's Texas Civil Statutes, 1925, Art. 5154A, Sec. 5.

COUNTER POINT ONE

The Court of Criminal Appeals of Texas, in the instant case, applied the rule of "clear and present danger" in accordance with the principle announced in *Bridges* v. *State of California*, 314 U. S. 252, 62 S. Ct. 190, and concluded that:

(a) the publications were made and published with the purpose and intent on the part of the publishers to force and compel a trial judge to change his decision, set aside the judgment theretofore rendered and to grant a new trial in a civil case then pending before him; (b) the likelihood that the publications, when considered together, would cause the Judge to accede to such demand was exceedingly high, and presented a clear and present danger to the due administration of justice in the case; and

(c) having followed the current rule of law, the decision of the Court of Criminal Appeals of Texas should be overturned only when and after this Court finds, from an independent examination of the record, that the undisputed facts authorized no such conclusion.

ARGUMENT

In the first point raised by petitioner, it is contended that the Court of Criminal Appeals of Texas, under the guise of applying the "clear and present danger" rule, in reality applied the "reasonable tendency" or "reasonably calculated" rule, recognized by the courts of last resort of many states and applied by them prior to the decision in the Bridges case.

Petitioner's conclusion is evidently based on the fact that the court below in several instances cited authorities which used the words "tendency" or "calculated to," or "tending to." It is pointed out that the Court of Criminal Appeals stated that "but when newspaper publications are made during the pending of a case in court, and reach the point of interfering with the due administration of justice in the courts of this state, they cease to be protected by these constitutional guaranties," (R. 428) and cited in support of this view the case of *Craig* v. *Hecht*, 263 U. S. 255-278, in which Chief Justice Taft said:

> "It is of primary importance that the right freely to comment on and criticize the action,

opinions, and judgment of courts and judges should be preserved inviolate; but it is also essential that courts and judges should not be impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgment or of impairing the justice and impartiality of verdicts.

"If the publication criticizes the judge or court after the matter with which the criticism has to do has been ended, so that the carrying out of the court's judgment cannot be thereby obstructed, the publication is not contempt and cannot be summarily punished by the court; however false, malicious or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel. If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in carrying out its orders and judgment, the court may and it is its duty to, protect the administration of justice by punishment of the offender for contempt."

Petitioners also point out that the court below cited the case of *Patterson* v. *Colorado*, 205 U. S. 454, and requote from that opinion only the words, ". . . it would tend to obstruct the administration of justice. . . ." They also quoted Chief Justice Chite's restatement of the conclusions of Judge Killits in *Toledo Newspaper Company* v. *U. S.*, 247 U. S. 402, and invite a comparison of what the Court of Criminal Appeals, per Judge Davidson, has stated were the purposes of the publications in the in-

stant case with the conclusions of Judge Killits.

It must be pointed out that the case of *Patterson* v. *Colorado*, supra, as well as the citation of 6 R. C. L., page 508, Section 20, were cited to support the conclusion of the Court of Criminal Appeals that the truth of a publication is no defense, and not for the purpose of showing that the "reasonable tendency" rule was applicable here. It should be further pointed out that the opinion of the Court of Criminal Appeals does not quote from the opinion written in the case of *Toledo Newspaper Company* v. *U. S.*, supra, and only refers to it in its discussion of the "reasonably calculated" rule. It will be seen at once that petitioners have omitted from their argument a very substantial portion of the *Craig* v. *Hecht* opinion quoted in the opinion of the Court of Criminal Appeals. The portions omitted include the language, ". . . having the direct tendency and effect of obstructing the enforcement of their orders and judgments, or of impairing the justice and impartiality of verdicts."

Certainly, the words "having the direct tendency and effect of obstructing" should not be interpreted as meaning that the publications having a mere "tendency" to obstruct the administration of justice are punishable as being contemptuous. Those words, in their setting, are words of accomplishment, and not of tendencies. Nor may that portion of the Craig opinion quoted by the Court of Criminal Appeals (R. 429),

> "If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in carrying out its orders and judgment, the court may, and it is its duty to, protect the administration of justice by punishment of the offender for contempt,"

be interpreted to mean that publications having a "reasonable tendency" to obstruct justice are punishable as contempt. The words as used in the context are descriptive of motive and purpose, and have no reference to what effect the publication might "tend" to have.

It is earnestly submitted here that the foregoing authorities cited by the Court of Criminal Appeals furnish no indication that the Court below confined itself to the application of the "reasonable tendency" rule, and that the definitive shadings of petitioner are merely literary distinctions, and do not demonstrate what Mr. Justice Frankfurter, in the case of *Bridges* v. *California*, 314 U. S. 252, 62 S. Ct. 190, (Dissent) terms "differences of Constitutional dimensions."

On the other hand, an analysis of the majority opinion (R. 418) of the Court of Criminal Appeals of Texas clearly demonstrates that the Court in affirming the judgment of contempt rendered by the trial court (R. 79) applied the "clear and present danger" test, in accordance with the principle announced in the case of *Bridges* v. *California*, supra.

where Mr. Justice Black, in commenting on the Schenck case, said:

> "What eventually emerges from the 'clear and present danger' cases is a working principle that the substantive evil should be extremely serious, and a degree of imminence extremely high, before utterances can be punished. These cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights."

It is evident from an analysis of the opinion of the Court of Criminal Appeals that the court had in mind, too, that portion of the opinion written in the case of *Schenck* v. *U. S.*, 249 U. S. 47, 39 S. Ct 247, by Mr. Justice Holmes, where it was said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger, that they will bring about the substantive evil that Congress has a right to prevent. It is a question of proximity and degree,"

as well as the statement of Mr. Justice Reed in the majority opinion written in *Pennekamp* v. *State of Florida*, 66 S. Ct. 1029:

> "What is meant by clear and present danger to a free administration of justice? No definition can give an answer,"

as well as the words of Mr. Justice Frankfurter, in his opinion in the same case (Concurring), " 'clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine, or to convey a formula for adjudicating cases."

From the language in the Bridges case, supra, and kindred cases, it may be safely concluded that each case of this kind is unique, and in each case the particular utterances and the circumstances of their publication must be looked to in determining the seriousness of the substantive evil sought to be prevented, and the degree of imminence. Upon the circumstances existing in every case must depend the rigor of the test applied.

A distinguishing feature in the Pennekamp case lies in the fact that there the publications constitute "only criticism of judicial action already taken" (90 L. Ed. 1010) while here the publications not only criticized judicial action already taken but went further and demanded a certain disposition be made of the case in the matter of granting a new trial as well as the future disposition of the case, by trial before some other judge.

Accordingly, then the Court of Criminal Appeals formulated the following rule for application in the instant case (R. 435):

> "From the Bridges case there emerges then the rule—as we understand it—that state courts are authorized under their inherent or common law power to inflict summary punishment for

> contempt of court upon the publisher of newspaper articles or editorials concerning and relating to a case then pending before the court, only when the language of the publication is used under such circumstances and conditions and are of such a nature as to create a clear and present danger that the due and orderly administration of justice in that case will be obstructed. The likelihood of bringing about that evil must be extremely serious and the degree of imminence extremely high,—the question of that likelihood being one of proximity and degree."

The respondents earnestly insist that in the circumstances in this case this is the correct rule. Of the fact that it was the rule applied here there can be no doubt. The Court of Criminal Appeals in its opinion (R. 435) said:

> "The fact elements distinguish the Bridges case, supra, from the instant case, and render it uncontrolling here, on the facts. However, the rule of clear and present danger, as announced in the Bridges case, supra, is controlling here. It is in the light of that rule, then, that we are ultimately to decide this case."

That there are broad distinctions to be drawn between the facts existing in the Bridges case and in the instant case, is obvious, and these distinctions will be discussed by respondents under Counter Point Two.

It may be that petitioners base their contention that the "reasonable tendency" rule was applied in that portion of the findings of the Court of Criminal Appeals (R. 436) which says:

"It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force and compel a judge to change a ruling or decision in a case pending before him than was here done. The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would. . ."

Certainly under the circumstances, there is nothing obscure or ambiguous about this language. It must be conceded that any publications that might constitute a clear and present danger to the administration of impartial justice would of a necessity be "reasonably calculated" to accomplish that result.

The Court of Criminal Appeals (R. 436) stated:

"When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong, and they took it upon themselves to make him change his decision. To accomplish that end, Judge Browing's action in instructing the jury, without hearing argument on the motion, was editorially denounced as a 'travesty on justice' and 'high handed;' as properly bringing 'public opinion down on his head;' as outraging 'public opinion;' as a 'tragedy' that the case could not be appealed to another judge

who was 'able to interpret and weigh motions and arguments of opposing counsel and to make his decisions accordingly;' and as a repudiation of the 'first rule of justice,' as a consequence of which 'there is no way of knowing whether justice was done.'

"Following, and in connection with, the editorials, news items were published showing that a certain group of citizens had passed a resolution denouncing the decision as a 'gross miscarriage of justice.' Other news items followed, showing that three different groups of citizens were petitioning or circulating petions calling on Judge Browning to grant Mayes a new trial in the case, and 'to permit the case to be re-tried by another judge,'—all to show that by reason of the attitude of the publishers toward Judge Browning's ruling and decision, as reflected in the editorials, public opinion had become aroused and was demanding that a new trial be granted in the case, because, in agreement with the viewpoint of the publishers, Judge Browning's ruling was wrong.

"It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done. The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high.'"

And further (R. 438):

"From what has been said, the conclusion is

> expressed that the publications warranted Judge Browning in holding relators in contempt of court, under the decisions of this Court and of the Supreme court of the United States. The relief prayed for is denied, and relators are remanded to the custody of the arresting officer."

It is submitted that these conclusions and findings of the court below resulted from a proper application of the correct rule, and that they were, as Mr. Justice Frankfurter has said in his concurring opinion in the case of *Pennekamp* v. *State of Florida*, supra, within the wide field in which a state court may exercise its judgment in an estimate of danger in a particular case, and that they should, in accordance with the view expressed by Mr. Justice Reed in the Pennekamp case, supra:

> "while the ultimate power is here to ransack the record for facts on constitutional controversies, we are accustomed to adopt the result of the state court's examination,"

be adopted by this honorable court.

COUNTER POINT TWO

The finding of the Court of Criminal Appeals of Texas that the publications complained of constitued a clear and present danger to the impartial administration of justice is supported by the record in this case, is warranted under the circumstances, and is within the field of that court's judgment.

ARGUMENT

Under this point petitioners take issue with the Court of Criminal Appeals of Texas upon the correctness of that court's findings, basing their contention that the court erred principally upon their own interpretation of a single one of the publications, and the alleged fact that the resolutions adopted by certain organizations (R. 161-162) and publicized by petitioners, were not charged to have been approved editorially .

By their interpretation of this single publication (The Crow's Nest, R. 378) they attempt to persuade the court that the purpose of the editorial was to comment upon Art. 5, Sec. 15, of the Texas Constitution, (APP. p. 39) which requires that a county judge have no legal qualifications beyond being "one well informed in the law of the state," and the urging of a change in the Constitution which would require a county judge to be a licensed lawyer.

This position is untenable, for several reasons. Primarily, the Court of Criminal Appeals did not find that this lone editorial constituted a clear and present danger to the impartial administration of justice. The language of that court's opinion (R. 436) is:

> "When the *several publications* in the instant case are considered together and in chronological order of their appearance . . ."

And (R. 436):

> "The *publications* were not only reasonably calculated to accomplish that purpose, but there was also a clear and present danger that they would . . . ." (Emphasis ours)

Next, a reading of the editorial in question leaves no doubt but what it was a direct attack upon Judge Browning's action in instructing a verdict for the plaintiffs without hearing the arguments of counsel. While it is true that in its opening paragraph the editorial (R. 378) says:

> "The week-end incident in the county court lends force to a frequently made argument that the judge should be a lawyer, . . ."

The second paragraph of the editorial, however, makes it clear that the comment on the legal qualifications of county judges is merely incidental to the criticism of Judge Browning's ruling:

> "The *incident around which the present controversy rages* involves such a case . . ." (Emphasis ours) (R. 378)

The editorial then goes on to describe the proceedings leading up to the judge's refusal to hear argument. At this point criticism of the judge's ruling commences, and is continued until the writer admits that he "doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority." (R. 380) Following this admission, the writer then concludes, in part, that "he only knows that respect for the court's ability to mete out justice has been badly shaken, a result that can

make for a dangerous condition. . ." (R. 380)

Petitioners wholly failed to explain how the writer, in spite of his professed ignorance of the law, was able to determine that the plaintiff (R.378-379) "employed a technicality in seeking to break the lease . . ." and (R. 379) "obviously he (Judge Browning) had an even more sketchy knowledge of the points of law." Nor is it made clear, either by the writer or his counsel, that there were any points of law raised in the plaintiff's motion for an instruction that had not been raised by the motion made by defendants for the same purpose, which last motion "the judge overruled . . . after hearing both sides." Neither is it made to appear in what manner the hearing of arguments on plaintiff's motion for an instruction would have altered the court's ruling.

It is submitted that the editorial, even standing by itself, clearly conveys the meaning that the judge's action was erroneous, and was entirely unsatisfactory to the writer and to the entire jurisdiction. This interpretation is supported by the writer of the editorial himself, who, in his statement to the court at the conclusion of the contempt hearing (R. 425) said:

> "It was my hope that the Crow's Nest published in the papers would quicken the conscience of the judge (fol. 587) . . . I wanted him to search his conscience. It was my hope that what I said would make him more careful in discharging his duty. I think my column was calculated to have that effect upon a conscientious judge."

Why, unless the writer was convinced that Judge Browning was indeed knowingly responsible for "a travesty on justice" should he desire that the judge search his conscience, and hope that as a result of the editorial the judge would be more careful in the discharge of his duty?

Surely, this statement clearly demonstrates that the editorial was intended to mean that the judge had been, to say the least, careless in the performance of his duty, and that the judicial conscience was, or at least should be, uneasy.

This editorial, it must be remembered, was written on May 30, 1945, (R. 376-377) two days after counsel for Mayes had announced that a new trial would be sought (R. 375), and on the morning immediately following the actual filing of the motion (R. 389), and before the motion was heard on June 6, 1945. (R. 407)

Further weakening petitioners' position is the fact that the record in this case wholly fails to show that any of the newspapers here involved had ever before editorially advocated amending the Texas Constitution in such a manner as to require county judges to be licensed attorneys, although subsequently the editorial writer states (R. 405) that he had discussed the matter with members of the Nueces County Bar Association.

This is only one of the many points upon which the instant case may be distinguished from the

Bridges case, supra. In the Bridges case, as Mr. Justice Black has pointed out, the Los Angeles Times editorial was written pursuant to a well established and militant editorial policy in labor controversies.

The Court of Criminal Appeals' finding that all of the several publications, considered together, constituted a clear and present danger to the impartial administration of justice is supported by the publications themselves, as well as the record in the case. For instance, petitioners' Exhibit T-29 (R. 377) contains the following language:

> "Browning has undergone severe criticism from disinterested sources because of the manner in which he terminated the trial. He exercised a legal right to order the jury to find a verdict for the plaintiff and the jury, asserting it was bound by its conscience, twice refused before capitulating on Sunday morning, 15 hours after the order was issued.
>
> "Browning was not available today for comment on Lewright's motion for a new trial. At his office it was stated that he would not be in unless probably late this afternoon. He was not at home, either.
>
> "The opinion is growing that he will be compelled by rising public sentiment to grant the motion, and, if the new trial ensues, to leave the ultimate decision to the jury."

Petitioners' Exhibit C-30 (R. 380-381) reads in part as follows:

"The Soldier's and Sailor's Advisory Council, formed in 1940, with the avowed purpose of protecting the rights of men in uniform, is composed of representatives of two American Legion posts, two Veterans of Foreign Wars posts, which claim a combined membership of over 1,000.

"The council's resolution called on Browning to grant Mayes a new trial on the ground that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the trial, and should permit the trial to be retried before another judge and jury."

Petitioners' Exhibit C-31 (R. 384) reads in part as follows:

"Three local groups were reported last night to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

"One petition is reported being drawn by a parents and teachers group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

"The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly."

That these resolutions and public opinion generally were the direct result of the publicity given the trial of the Jackson-Mayes case may be readily understood after a consideration of the following facts proved during the contempt hearing:

It was shown that the three newspapers here involved are the only bona fide newspapers published in Nueces County, and that the Caller-Times has a circulation estimated by petitioner Mulvany at approximately 50,000. (R. 157) That the newspapers were sold in and around the court house during the course of the Jackson-Mayes trial (R. 151), and that the news stories of the Jackson-Mayes trial were given a prominence comparable with that of the account of the reduction of Tokyo to shambles by B-29 bombers. (R. 88)

The witness Samuel I. Pittman, attorney who prepared the resolution adopted by "Mothers of Men in Service" (R. 161) testified in substance (R. 163-164) that in the preparation of the resolution the witness had had nothing to serve as a guide beyond what he had seen in the papers; that he had obtained his idea for the substance of the resolution from what he had seen in the papers, and that he thought the resolution adopted by the Soldier's and Sailor's Advisory Council of Corpus Christi (State's Exhibit 13, R. 162) was a very good resolution, and that it suited his clients in that respect; and that his clients had reported to him "that they had inquired around here and there, and had been reading in the newspapers, and had got a good deal of this thing . . .

and everybody was pretty well appraised of the facts from the newspapers . . ." (R. 164)

The witness Aubrey Daly, a member of the Soldier's and Sailor's Advisory Council and commander of the American Legion, testified in substance (R. 186) that he had been called by a reporter of the Caller-Times and asked if any action was going to be taken; that his only source of information was hearsay and what he read in the newspapers, and what he had heard coincided pretty accurately or closely with what he had read, and that what he had heard and what he had read could have come from the same source.

The witness Rex Vickery, Chairman of the Soldier's and Sailor's Council, testified in substance (R. 176-177) that the "full investigation" referred to in State's Exhibit 13, was "just what was heard by different ones that talked to us, also what was in the papers; that no one was appointed to make an investigation, but that the resolution had been adopted on what had been heard and seen in the papers"; that the investigation referred to in State's Exhibit 13 "consisted of the discussion had by members of the Council at the meeting and hearsay and what was read in the papers."

The effect of the publications upon public opinion, —and the adoption of these resolutions, are some of the circumstances which affect the question of proximity and degree in this case. Still another such circumstance is the original question as to what

duty the newspapers were under in connection with the reporting of and comment upon the Jackson-Mayes case, in the light of the public's interest in that case. Even if it is to be assumed that newspapers are under the duty to safeguard the integrity of judicial processes and the administration of justice, their actions should be controlled by the degree of interest the public generally has in litigation pending.

It may be conceded that the people of California generally and the Los Angeles Times as well, had a legitimate interest in the trial and sentencing of Shannon and Holmes. The interest of the people sprang from the fact that the Shannon-Holmes case was a criminal proceeding, and the people of California were, through proper agency, party to the action. Moreover, labor controversies directly affect public welfare to a greater or lesser degree. For this latter reason, too, the people of California were directly interested in and likely to be affected by Bridges' telegram to the Secretary of Labor and the strike threat that it contained. But in the Jackson-Mayes case the people of Texas could have no interest. In that cause two parties in a civil action were litigating for possession of premises upon which a beer saloon was located. It is a matter of common notoriety that thousands of such forcible detainer cases are tried in the State of Texas each year, without affecting one whit the welfare of its people. In fact, this very Jackson-Mayes case, when first tried in Justice Court, was deemed to be of so little importance as to be dismissed with a scant 500 words of

print (R. 158) by the very reporter who wrote the thousands of words used in publicizing the trial de novo on appeal. (R. 127)

In the Pennekamp case, supra, as in the Bridges case, it may be conceded that the people of Dade County, Florida, had a well defined interest in the manner in which criminal cases were being handled in their circuit courts. The Miami Herald consequently was justified in criticizing a condition that it deemed baneful to public morals and welfare. In the Jackson-Mayes case, however, there was no reason to believe that the forces of law and order were breaking down. There could have been no threat to public morals, or to life or property, regardless of the outcome of the case. The only people who could have been affected, directly or indirectly, by any judgment, correct or erroneous, that could be entered in the Jackson-Mayes case, were the parties plaintiff and defendant.

There are other important distinctions to be drawn between the instant case and both the Bridges case and the Pennekamp case, supra. In the Jackson-Mayes case Judge Browning had no way of knowing or deducting until apprised by the newspapers that any ruling he might make in the case would subject him to criticism by either newspapers or the public generally, or that any result inimical to the public interest would flow from his action.

Both Judge Scott and Judge Schmidt of the California courts, it was held in the Bridges case, did have, or should have had knowledge of labor condi-

tions, existing before these conditions were publicized, and that in this they should have foreseen certain rulings would subject them to adverse criticism.

In the Pennekamp case, supra, it was said that the cases mentioned were cited merely as examples of the attitude of the courts toward defendants in criminal cases, and that no criticism was leveled at any specific ruling in any cause then pending. In the Jackson-Mayes case, however, we have a direct and powerful attack upon a specific ruling in a matter immediately pending, coupled with an inspired and equally powerful demand for a reversal of that ruling.

Under this state of facts, it is not surprising that the Court of Criminal Appeals of Texas said:

> "It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force and compel a judge to change a ruling or decision in a case pending before him than was here done." (R. 436)

The complete lack of interest in the Jackson-Mayes case to any person save the parties thereto, as well as the newspapers' lack of any established policy as to the legal qualifications of county judges, wholly failed to justify the newspapers' treatment of the Jackson-Mayes case, for as Mr. Justice Black has said in the Bridges case, supra:

> "Legal trials are not, like elections, to be won through the use of the meeting hall, the radio and the newspapers."

It is again submitted, as under Counter Point One, that the conclusions and findings of the Court of Criminal Appeals of Texas are correct, that they are within the recognized field in which it may exercise its judgment in an estimate of danger in a particular case, and that they should be adopted by this honorable court.

COUNTER POINT THREE

The truthfulness of publications commenting on a pending trial constitute no defense, when the publications present a clear and present danger to the impartial administration of justice.

ARGUMENT

If it be that petitioners contend under Point Three that the news stories of the Jackson-Mayes trial were accurate accounts of the proceedings had during that trial, a glance at the record will reveal the fallacy of their contention.

As stated by the Court of Criminal Appeals in its opinion (R.419):

> "The pivotal issue in the case was whether Mayes's lease of the building had expired because of non-payment of rentals as contracted."

The record shows that the defendant Mayes's agent tendered in payment a check not made pay-

able in the proper amount. When apprised of the fact that the extension of the lease required rental in an increased amount, the agent tendered to plaintiff a check drawn in the correct amount, but post dated 30 days. It was held by Judge Browning that the tender of this post dated check did not constitute payment as provided for in the lease.

Without attempting to list them, it may be said that the news stories purporting to describe the proceedings had in the Jackson-Mayes case made many references to the tender of this check, but no reference was ever made to the fact that the check was post dated.

The petitioner Mulvany on this point testified as follows (R. 130):

> "Q. Well, let me ask you this question, Mr. Mulvany. Did you ever in your writing at any time after the morning of Saturday, the 26th day of May, until you were cited in contempt by this court, make any reference to the fact that that check was post dated?
>
> "A. In the printed stories in the paper?
>
> "Q. Yes.
>
> "A. I don't believe so.
>
> "Q. I will ask you to be a little more definite. Did you, or did you not?
>
> "A. I have forgotten the date of the institu-

tion of the contempt proceedings, and I will say this: I have read through the Sunday and Monday stories of the 27th and 28th of May, and I believe my recollection is that there was no reference to any tender of a post dated check in either of those news stories. Now, the trial ended on the 27th. During the course of the trial I beileve I did not use your term 'a post dated check' in any story that I wrote."

In the Jackson-Mayes case the testimony of the plaintiff's witness, Ben F. Vaughan, on several points was diametrically opposed to evidence adduced by the defendant. Mr. Vaughan's testimony, however, was not published. The petitioner Mulvany, on that score, testified as follows (R. 135):

"Q. Why didn't you use Mr. Vaughan's testimony?

"A. In my judgment it was not particularly newsworthy. I have a great mass of testimony and a great mass of notes. . . . (R. 149)

"Q. But you didn't publish them, did you?

"A. No, I didn't use any of Mr. Vaughan's testimony.

"Q. You didn't think that Mr. Vaughan's denial was newsworthy?

"A. No, I didn't think it was correct.

"Q. You didn't think it was correct?

"A. No.

"Q. What gave you that impression?

"A. Because of some other statements he made under direct examination he retracted under cross examination.

"Q. In other words, you weighed that evidence?

"A. Yes, sir, I did, for its news value only."

On the other hand, if it be that the petitioners base their contention that the publications were true upon their assertion that Judge Browning's instruction to the jury was an error in law, then it must be said that their defense comes as an afterthought.

It must be remembered that petitioner McCracken, in his editorial criticism of Judge Browning (R. 378), criticized not the granting of the motion for an instruction, but the court's refusal to hear argument on the motion. On the instruction itself, the petitioner McCracken had this to say (R. 380):

"The Lookout, himself a layman, doesn't have the slightest idea whether the decision reached in this particular case is supported by legal authority."

Petitioners have not attempted to show that the law of the State of Texas requires a judge presiding at a trial to hear arguments on motions, nor, indeed, could this be shown, since the matter of hearing such argument lies entirely within the sound discretion of

the court. However, if it were admitted, which it is not, that petitioners had in fact criticized the instruction given by the court rather than the refusal to hear argument, and that in fact the court's instruction to the jury was erroneous, the Court of Criminal Appeals was nevertheless correct in holding (R. 431) that:

> " - - - The controlling rule to be applied in cases of contempt alleged to have been committed by publications during the pendency of a case in court and relating thereto, is that it is no defense that the publications are true;" and further:
>
> "Perhaps a more conclusive reason why relators were not entitled to show as a defense that Judge Browning's decision was incorrect lies in the fact that no appeal was authorized therefrom, in order that some other court might review his action. If we were to allow that defense here we should review that ruling, in direct opposition to the statute. The issue before us is not whether Judge Browning's ruling was correct or incorrect . . . ."

Of the law applicable, the Court of Criminal Appeals said:

> "It is also the law in this state that in a forcible entry and detainer case the judgment of the county court is final; no appeal is allowed. Art. 3992 R.C.S. (APP. p. 39) The constitutionality of that statute has been affirmed by the Supreme Court of this state. *Beacon Lumber Company* v. *Brown*, 14 SW 2nd 1022. The right of appeal is not a prerequisite of due process, as

guaranteed by our Constitutions. *Luckenbach* v. *U. S.*, 272 U. S. 533, 71 L. ed. 394. It follows, then, that the county court of Nueces County has jurisdiction of the forcible entry and detainer suit, Judge Browning was the judge thereof, whose duty it was to preside in the trial of that case, and to determine the questions of law arising in that controversy."

The Court of Criminal Appeals quotes from the case of *Paterson* v. *Colorado*, 205 U. S. 454, 27 S. Ct. 556, in support of its holding that in cases of this kind the truth is no defense:

> "A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and arguments in open court, and not by outside influence, whether of private or public print."

It is thought, however, that in view of petitioners' argument under Point Three, additional portions of the opinion in the *Patterson* v. *Colorado* case, supra, are applicable, and particularly that portion of the opinion which reads:

> "The foregoing proceedings are set forth in a bill of exceptions, and several errors are alleged. The difficulties with those most pressed is that they raise questions of local law, which are not

open to re-examination here. The requirement in the 14th Amendment of due process of law does not take up the special provisions of the state Constitution and laws into the 14th Amendment for the purpose of the case, and in that way subject a state decision that they have been complied with to revision by this court. *French* v. *Taylor*, 199 U. S. 274, 278, 50 L. ed. 189, 192, 26 Sup. Ct. Rep. 76; *Rawlins* v. *Georgia*, 201 U. S. 638, 639, 50 L. ed. 899, 900, 26 Sup. Ct. Rep. 500; *Burt* v. *Smith*, 203 U. S. 129, 135, 51 L. ed. 121, 27 Sup. Ct. Rep. 37. For this reason, if for no other, the objection that the information was not supported by an affidavit until after it was filed cannot be considered. See, further, *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569. The same is true of the contention that the suits referred to in the article complained of were not pending. Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the Constitution of the United States."

It is submitted that the contentions urged by petitioners under Point Three do not present a question which will sustain a writ of certiorari from the Supreme Court of the United States to the Court of Criminals Appeals of Texas.

COUNTER POINT FOUR

The judgment of the Court of Criminal Appeals of Texas, rendered herein, contains no elements affecting its validity, force or effect.

ARGUMENT

In their argument under Point Four, petitioners appear to take the view that the proceedings had in the Court of Criminal Appeals constituted an appeal from the judgment of contempt rendered by the county court. This, of course, is not case. The proceedings had were original in the Court of Criminal Appeals, and the judgment now under consideration is the original judgment of that court.

There was and could be, as petitioners have stated at page 3 of their petition, no appeal from the judgment of contempt. Petitioners have not urged that this denial of the privilege of appeal has deprived them of due process of law. The question presented for determination in this original proceeding was the legality of the restraint of the petitioners.

In making the determination, the Court of Criminal Appeals considered the propriety of the proceedings employed, the form and the validity of the judgment, as well as the state and Federal Constitutional questions. The propriety of the procedure and the form and validity of the judgment, aside from the Federal question, are to be determined in accordance with local law. *Patterson* v. *Colorado*, 205 U. S. 454.

Of the phases of the case controlled by local law the Court of Criminal Appeals said (R. 424):

> "Various reasons were assigned whereby it was claimed that the articles mentioned constituted contempt of court, none which we discuss save and except that which charges that the

articles when taken together and considered as a whole 'were calculated and intended to falsely present' to the public the nature of the proceedings had and to compel a different result on the hearing of the motion for a new trial' and to 'prejudice and influence the court in its ruling on the aforesaid motion for a new trial . . . and were made at a time and under circumstances calculated to affect the force of justice in said proceedings . . .

"Upon consideration of this complaint and on the same day of its filing, Judge Browning caused to be entered a judgment nisi in which he found that the relators had published the statements alleged and that said publications were continuous and calculated to bring about the evil, as charged, as a consequence of which the relators were adjudged to be in contempt of court, and the punishment of each was fixed at three days' confinement in jail. An order was incorporated therein, commanding relators to appear at a future date to show cause why the judgment nisi should not be made final. The procedure employed was authorized, 9 (fol. 586) Tex. Jur., p. 623, sec. 37. No attack is here made thereon.

"The judgment nisi, after a full hearing, was made final on August 9, 1945."

In any event, the authority cited by petitioners, *Thomas* v. *Collins*, 328 U. S. 516, in support of their Point Four, would have no application here.

In its judgment in the Thomas case the Supreme Court of Texas found that Thomas had violated a restraining order of the Texas District Court by

addressing a general invitation to an audience to join a union, as well as specifically inviting a named individual to do likewise. These invitations, it was held by the Supreme Court of Texas, were violative of sec. 5 of Texas R.C.S., art. 5154A, and for that reason the judgment of contempt rendered by the district court whence the restraining order had issued was affirmed.

The holding of this court in the Thomas case was to the effect that Sec. 5 of Texas R.C.S. Art. 5154A, (App. p. 39) constituted a restraint upon freedom of speech, and that to restrain an individual from issuing a general invitation of the nature here issued by Thomas would be to deprive him of his Constitutional right of freedom of speech.

As to the specific invitation to the individual, the court was silent, and for this reason the holding in the Thomas case should not be considered as voiding a judgment because of any element contained therein.

On the subject of this specific invitation, the court merely said:

> "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.
>
> "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as

when he undertakes the collection of funds or securing of subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said the State might regulate, in *Schneider* v. *State*, supra, and *Cantwell* v. *Connecticutt*, supra. That however must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. In this case the separation was not maintained. If what Thomas did, in soliciting Pat O'Sullivan, was subject to such restrictions, as to which we express no opinion, that act was intertwined with the speech and the general invitation in the penalty which was imposed for violating the restraining order. Since the penalty must be taken to have rested as much on the speech and the general invitation as on the specific one, and the former clearly were immune, the judgment cannot stand."

On the other hand, in the instant case, the state court has found that (R. 436):

> "The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would and the likelihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high.'"

It should be noted that there is no finding in the state's judgment that the publications were calculated to or did scandalize the judge.

Under the circumstances, it is submitted that under Point Four petitioners do not present a question that will sustain a writ of certiorari from the Supreme Court of the United States to the Court of Criminal Appeals of Texas.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the Court of Criminal Appeals of Texas should be denied.

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APPENDIX

Article 5, Sec. 15 of the Constitution of Texas, is as follows:

> "There shall be established in each county in this State a County Court, which shall be a court of record; and there shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State; shall be a conservator of the peace, and shall hold his office for two years, and until his successor shall be elected and qualified. He shall receive as a compensation for his services such fees and perquisites as may be prescribed by law."

Article 3992 of Vernon's Texas Civil Statutes, 1925, provides:

> "The judgment of the County Court finally disposing of the cause shall be conclusive of the litigation, and no further appeal shall be allowed, except where the judgment shall be for damages in an amount exceeding one hundred dollars."

Article 5154a, Section 5, Vernon's Texas Civil Statutes, is as follows:

> "All labor union organizers operating in the State of Texas shall be required to file with the Secretary of State, before soliciting any members for his organization, a written request by United States mail, or shall apply in person for an organizer's card, stating (a) his name in full; (b) his labor union affiliations, if any; (c)

describing his credentials and attaching thereto a copy thereof, which application shall be signed by him. Upon such applications being filed, the Secretary of State shall issue to the applicant a card on which shall appear the following: (1) the applicant's name; (2) his union affiliation; (3) a space for his personal signature; (4) a designation, 'labor organizer'; and, (5) the signature of the Secretary of State, dated and attested by his seal of office. Such organizer shall at all times, when soliciting members, carry such card, and shall exhibit the same when requested to do so by a person being so solicited for membership."